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Nos. 83-1013, 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Respondent;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT

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August 20, 1984

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QUESTION PRESENTED

Whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(*l*), prohibits the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A96)[1] is reported at 719 F.2d 624.

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1013. "Br. in Opp. App." refers to the appendix to the brief in opposition to the petitions.

STATUTES AND REGULATION INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are set forth in Pet. App. A116-A121 or the Appendix to this brief. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (b)(2)(A) and (C). Indirect dischargers had no more than three years from the date of promulgation to meet "pretreatment standards" designed to prevent discharges of pollutants which harmed the environment or the sewage treatment plant. 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (2)(A) and 1317(b). Pretreatment standards, too, were technology-based.[2]

BPT, BAT, and pretreatment were each integral to the overall scheme to clean up the nation's waters, but the pretreatment standards were especially important. Because municipal sewage plants are ordinarily not designed to treat industrial waste water, the pretreatment standards served a dual function. Like BPT and BAT limits, they prevented untreated or inadequately treated industrial wastes from entering waterways and drinking water supplies. In addition, unlike BPT or BAT limits, they protected the nation's multi-billion dollar investment in municipal sewage treatment plants. *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93rd Cong., 1st Sess. 800, 1479 (1973)[hereinafter cited as 1972 *Legis. Hist.*].

[2] The Act did not initially tell EPA how to set pretreatment standards. EPA adopted a technology-based approach to pretreatment in response to a lawsuit filed by NRDC. Congress later ratified this approach. See discussion, p. 5, *infra*.

For example, the pretreatment standards were intended to stop highly damaging industrial chemicals from interfering with sewage treatment plant performance, as happened in Louisville, Kentucky where the sewer system exploded from industrial contaminants, according to EPA. Transcript of Oral Argument in Court of Appeals at 271. The pretreatment standards also were supposed to prevent toxic industrial pollutants from contaminating sewage treatment plant sludge, which, if laden with toxics, limits a municipality to expensive or environmentally troublesome sludge disposal options. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2nd Sess. 690 (1978) [hereinafter cited as 1977 *Legis. Hist.*]. Kokomo, Indiana illustrates the point; that city's sludge became so toxic with electroplating wastes that the state, according to EPA, declared the sludge a hazardous waste. Transcript of Oral Argument in Court of Appeals at 271. Thus, Congress put EPA on an even faster schedule for setting pretreatment than for BPT and BAT requirements.[3] It told EPA to use the pretreatment standards "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." 1977 *Legis. Hist.*, *supra*, at 690.

From 1972 to 1977, EPA issued a series of BPT, BAT, and pretreatment requirements. Most of its BPT limits included a provision authorizing variances for those sources

[3] For example, Congress gave EPA one year to issue guidelines for developing BPT and BAT, but only 120 days to do so for pretreatment. In addition, EPA had only 180 days from enactment to propose, and 90 more days to publish, pretreatment standards. Cf. Section 304(b)(1) and (2), 33 U.S.C. 1314(b)(1) and (2), with Sections 304(f)(1) and 307(b)(1), 33 U.S.C. 1314(f)(1) and 1317(b)(1).

which were "fundamentally different" (in terms of the factors relevant to BPT) from the sources in EPA's data base. The pretreatment and BAT limits did not include such a variance.

EPA's initial round of standard-setting led to substantial litigation. The technological issues were, indeed, complex, but EPA by its own admission failed to devote adequate resources to the task and lacked a reservoir of industry-oriented expertise in its infant regulatory program. *Id.* at 1463. The result, in the eyes of Congressional investigating staff, was "uneven performance." *Id.* at 335.

In addition, significant questions of statutory interpretation arose. This Court resolved one such issue, upholding EPA's authority to issue industry-wide regulations for BPT and BAT against an industry challenge in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). *DuPont* held that Congress clearly contemplated national rules for BAT, which, by its terms, applied to "categories and classes" of sources. *DuPont* also held that the law authorized national regulations for BPT, even though the statute, which spoke of individual "point sources" rather than categories and classes of sources, was not as clear on this point. The Court, however, held that the "fundamentally different factors" or "FDF" variance clause in EPA's BPT rules made the rules sufficiently flexible for individual point sources. *Id.* at 126-128. *DuPont* did not address variances from the Act's BAT or pretreatment requirements; it did, however, hold that EPA could not create variances which were not authorized by statute from the Act's new source standards. *Id.* at 137-139.

In 1977, shortly after *duPont*, Congress took stock of the law. It found that progress in controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated, notwithstanding the challenges to EPA's regulations. 1977 *Legis. Hist.*, *supra*, at 330. It therefore eased future control requirements for conventional pollutants.[4]

[4] In Sections 301(b)(2)(E) and 304(b)(4) of the Act, 33 U.S.C. (Supp. V) 1311(b)(2)(E) and 1314(b)(4), Congress created a new technology-based requirement, "best conventional pollution control technology." This new requirement would be at least equal to BPT, but possibly not as stringent as BAT. 1977 *Legis. Hist.*, *supra*, at 427-428.

At the same time, Congress conceded that the principal regulatory mechanism for control of toxics had failed. 1977 *Legis. Hist.*, *supra*, at 326-327. Alarmed by mounting evidence of the seriousness and ubiquity of these pollutants, Congress ordered a "major redirection and refinement" of EPA's regulatory program to focus control on toxics. *Id.* at 326-327, 454-455, 862-865. First, Congress elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics, essentially codifying a settlement agreement[5] formulated by NRDC and EPA. *Id.* at 455. This agreement required EPA to upgrade BAT, pretreatment, and new source standards to include specific limits on 65 toxic compounds in 21 industrial categories. *Id.* at 336.

Second, Congress enacted several amendments strengthening the pretreatment program.[6] It reaffirmed the technology-forcing aspects of pretreatment standards, repeatedly emphasizing that these standards should reflect technology comparable to BAT for direct dischargers. *Id.* at 271, 342, 403, 461, 690.

Finally, Congress defined when, and under what conditions, sources could obtain variances from BAT and pretreatment requirements. It cut back on the economic capability variance in the 1972 law, eliminating its use for toxic pollutants.[7] It created a new "safety valve" to give flexibility to BAT limitations, again prohibiting its use for toxics.[8] It did not create any variances from pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger

[5] *NRDC* v. *Train*, 8 Env't. Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom. NRDC* v. *Costle*, 12 Env't. Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, Nos. 2153-73, *et al.* (D.D.C. Oct. 26, 1982), modified *sub nom. NRDC* v. *Ruckelshaus*, Nos. 2153-73, *et al.* (D.D.C. Aug. 2, 1983 and Jan. 6, 1984).

[6] *E.g.*, Congress gave EPA direct enforcement authority against non-complying indirect dischargers and enhanced the ability of pretreatment standards to protect sludge quality. 1977 *Legis. Hist.*, *supra*, at 690.

[7] Section 301(c), 33 U.S.C. 1311(c); 1977 *Legis. Hist.*, *supra*, at 328.

[8] Section 301(g), 33 U.S.C. (Supp. V) 1311(g); 1977 *Legis. Hist.*, *supra*, at 674-675.

and the sewage treatment plant.[9] Simultaneously, it enacted Section 301(*l*), 33 U.S.C. (Supp. V) 1311(*l*), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant ***."[10] It stressed that EPA could only grant variances for non-toxic pollutants, and urged EPA to err on the side of caution in applying this mandate.[11]

Six months later, EPA issued pretreatment regulations which, unlike its pre-1977 pretreatment standards, contained an FDF variance provision covering all pollutants, including toxics. 40 C.F.R. 403.13(Pet. App. A122).[12] EPA explained that this variance could be used for information which "will not be available or, for other reasons, will not be considered" during standard-setting. 40 C.F.R. 403.13(b). Neither the rule nor the accompanying preamble made any reference to Section 301(*l*). NRDC promptly challenged the variance.

One year later, EPA issued BAT rules which, for the first time, contained a similar variance provision. 44 Fed. Reg. 32854, 32893-32894 (June 7, 1979). Again, EPA made no mention of Section 301(*l*). Again, NRDC sued. This suit is still pending in the D.C. Circuit.[13]

NRDC raised two arguments below. First, it contended that all FDF variances from pretreatment standards were illegal; they were not authorized by statute any more than the new source variance invalidated in *duPont*. Second, NRDC

[9] Section 307(b), 33 U.S.C. (Supp. V) 1317(b); 1977 *Legis. Hist.*, *supra*, at 271-272.

[10] Congress listed the toxic pollutants covered by Section 301(*l*), incorporating the list developed by NRDC and EPA in the Consent Decree, n. 5, *supra*. EPA had authority to revise the list. Section 307(a)(1), 33 U.S.C. (Supp. V) 1317(a)(1).

[11] *E.g.*, "[T]he bill prohibits variances for [toxic] pollutants ***. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

[12] EPA issued the variance on June 26, 1978, 43 Fed. Reg. 27736-27773, and amended it on January 28, 1981, 46 Fed. Reg. 9404-9460. The 1978 regulations differed in several respects which are not relevant here.

[13] *NRDC, et al.* v. *EPA*, Nos. 80-1607, *et al.*

argued that FDF variances from pretreatment standards for toxics violated the newly-enacted Section 301(*l*).

The Third Circuit declined to address the broader question raised by NRDC's first argument.[14] Instead, it held that EPA's FDF variance clause violated Section 301(*l*). (Pet. App. A36-A43).

SUMMARY OF ARGUMENT

I.

The question before this Court is whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act prohibits EPA from granting variances from national pretreatment standards for toxic pollutants. To resolve this question, the Court need not accept petitioners' invitation to decide a broader issue: whether EPA may grant variances from pretreatment standards so long as the variances do not involve toxics [and, hence, do not violate Section 301(*l*)]. The broader issue is not properly presented to this Court because the court of appeals did not reach it.

This case, therefore, does not require this Court to review its decision in *duPont*. The question before the Third Circuit was whether Section 301(*l*), enacted after *duPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(*l*), something *duPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *duPont* in its discussion of Section 301(*l*). (Pet. App. A40-A43). Hence, petitioners' reliance on *duPont* is misplaced.

II.

The Third Circuit held that Section 301(*l*) of the Clean Water Act clearly prohibits variances from pretreatment standards for toxic pollutants. Because EPA's FDF variance allows case-by-case modifications to these very standards, the Third Circuit ruled that EPA's variance flies in the face of Section 301(*l*).

[14] The Third Circuit found it unnecessary to reach this question because it found that EPA had only issued pretreatment standards for toxic pollutants.

Neither petitioner offers a convincing reason for ignoring the statute's plain language. CMA says that the FDF variance is not really a "variance," even though it relaxes uniform, national pollution control requirements for individual sources. CMA's argument distorts the common understanding of the term "variance." EPA takes a different tack. EPA says that the statute is not clear at all, because if Section 301(*l*) is held to prohibit modifications of pollution control requirements, then it must also be read to prohibit EPA from upgrading standards to reflect new developments in technology. This, says EPA, is so absurd a result that EPA is free to develop its own construction of the statute.

EPA's argument fails on two counts. First, the statute—and the legislative history—make it clear that Congress addressed Section 301(*l*) to variances, not periodic improvements in the standards. Thus EPA cannot allow an individual source to get by with less stringent pollution control requirements than others in the same industrial class. It can, however, revise the requirements for all.

Second, EPA's construction of the statute does not square with the Act itself. Section 301(*l*) broadly bans all variances for toxics. EPA cannot narrow its scope to only certain variances [*i.e.*, economic or water quality variances] so that EPA is free to create other variances of its own choosing. Congress wanted a comprehensive ban on variances for toxics; it deliberately restructured Section 301 so that the toxics ban in subsection (*l*) would cover all Section 301 requirements, not just Sections 301(c) and (g) as EPA maintains.

III.

The legislative history confirms that Congress intended to ban all variances for toxic pollutants. There is no legislative history to support EPA's view that Congress banned only certain types of variances, leaving EPA free to create others.

EPA, in effect, says that because Congress did not mention FDF variances, Congress approved them despite Section 301(*l*). EPA's argument is absurd. Congress's primary goal in the 1977 amendments was strict control of toxics. Recognizing that variances could negate the plain thrust of

the amendments, Congress carefully circumscribed EPA's authority to grant variances.

It defies common sense—and ordinary principles of statutory construction, see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153 (1978)—to believe that Congress simultaneously gave EPA broad authority to create its own variances. Nor did *duPont* give EPA such authority. Thus, EPA's search for Congressional intent to reverse *duPont* is misguided.

More important, EPA had a well-defined practice in 1977 of restricting FDF variances to BPT limits. EPA did not include FDF variances in its pretreatment or BAT standards. If, as EPA maintains, Congress's silence affirmed agency practice, then Congress ratified the absence, not the presence, of FDF variances from pretreatment standards.

IV.

FDF variances for toxic pretreatment standards are not permissible or reasonable. They allow individual sources to escape otherwise applicable national standards, contrary to Congress's intent. It does not matter that EPA tries to restrict the scope of the variance to a reexamination of the statutory factors behind BAT. The statute has its own vehicle for applying BAT factors to individual sources: Section 301(c). Since Section 301(c) variances are not available for toxics, neither are FDF variances.

An FDF variance cannot be passed off as mere subcategorization or revision of a rule. EPA designed the FDF variance for use by a single source "within *** a subcategory." 40 C.F.R. 403.13(b)(Pet. App. A122). FDF variances thus defy Congress's instruction to avoid single plant evaluations in the technology-forcing context of BAT and pretreatment standards. In addition, FDF variances take close to a year or more to resolve. They interfere with the Act's strict compliance deadlines for pretreatment in a way that subcategorization during a rulemaking does not. Finally, the FDF variance is, procedurally, a Rube Goldberg contraption. It wastes EPA's scarce resources and delays compliance with the law. Standard rulemaking (or rule-revising) procedures are simple by comparison.

There are no convincing policy justifications for an FDF variance from pretreatment standards. The variance is not a necessary aspect of pretreatment standards development. It may have served, in a few past cases, to cover agency rulemaking mistakes on BPT limits. But the technology-based regulatory program is long past its infancy. It now has more industry-oriented expertise and more rulemaking experience. It makes no sense for a mature regulatory program to fail to consider information submitted in a rulemaking. Indeed, by doing so, EPA runs the risk that its rules will be overturned in court. It also makes no sense, as a matter of policy, to reward sources which withhold relevant information during a rulemaking with an additional opportunity for relief from otherwise applicable standards.

There are sound policy reasons for prohibiting FDF variances from toxic pretreatment standards. Focusing on atypical plants during the rulemaking could generate information which enhances the technology-forcing nature of the pretreatment standards for an entire industrial class. It will use agency resources more efficiently. It will avoid prolonged uncertainty over pollution control obligations for some plants. It will prevent unqualified applicants from using the variance process to buy time. And it will avoid the competitive inequities inherent in a phased approach to standard-setting within the same industrial category. Thus, the Third Circuit's decision will facilitate, rather than disrupt, implementation of the Act.

ARGUMENT

1. This case turns on the meaning of Section 301(*l*) of the Clean Water Act.

The question before this Court is whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act prohibits EPA from granting FDF variances from national pretreatment standards for toxic pollutants. The Third Circuit began with an analysis of Section 301(*l*). It found that Section 301(*l*) was clear, that it prohibited any variances from toxic pretreatment standards, and that this prohibition was fully in accord with the thrust of the 1977 amendments to the law. It also found no convincing policy grounds to differentiate FDF

variances from other variances indisputably prohibited by Section 301(*l*). Thus, the Third Circuit ruled that the FDF variance for toxic pretreatment standards violated Section 301(*l*). (Pet. App. A40–A43).

EPA therefore invites this Court to begin its analysis with something other than the plain words of the statute. Neither the Clean Water Act nor its legislative history mention the FDF variance, so EPA retreats to *duPont* and *EPA* v. *National Crushed Stone Ass'n.*, 449 U.S. 64, 72 (1980), which recognized EPA's implicit authority to grant FDF variances from *BPT effluent limits*.

Before *duPont*, EPA had used the FDF variance only for BPT limits. Its pretreatment and BAT standards did not contain FDF variance clauses. The variance, however, proved a convenient crutch for the standard-setters. In 1978, therefore, EPA added an FDF variance to the pretreatment program for the first time. In 1979, it added the same variance to its BAT standard-setting program. EPA now seeks justification for its expanded use of the FDF variance in *duPont*. *DuPont*, says EPA, prospectively sanctioned FDF variances from BAT as well as BPT limits (and hence, by analogy, from pretreatment standards too). EPA is wrong.

DuPont and *National Crushed Stone Ass'n.* were, indeed, pivotal cases. They cleared the way for the first phase of EPA's regulatory program. They allowed EPA to sidestep the quagmire of case-by-case standard-setting with industry-wide rules. In the words of one enthusiastic Member of Congress, *duPont* especially "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318. But neither case had the broad reach EPA now ascribes to it.

DuPont tried to reconcile the Clean Water Act's application of BPT to "point sources" with the overall statutory scheme which applies BAT (and pretreatment and new source standards) to "categories and classes" of sources. The Court concluded that BPT, like BAT, could be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its *1977* [*i.e.*, *BPT*] limitations." 430 U.S. at 128

(emphasis added). In short, *duPont* held that the FDF variance was a "necessary aspect" of BPT limits. *National Crushed Stone Ass'n.*, *supra*, 449 U.S. at 72. *DuPont* also implicitly found that an FDF variance was not a necessary aspect of BAT limits because it upheld BAT rules which did not contain an FDF variance clause.[15]

Congress may have been ambiguous in its instructions to EPA with respect to BPT, but it was explicit regarding BAT. Congress created its own BAT variance in Section 301(c) of the Act, 33 U.S.C. 1311(c), and deemed this the sole deviation from otherwise uniform, national standards:

> *Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.* The Administrator is expected to be precise in his guidelines *** so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

1972 *Legis. Hist.*, *supra*, at 309 (emphasis added).

EPA seizes *duPont's* statement that there is no "radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." 430 U.S. at 127. EPA takes the statement out of context. As this Court explained: "[N]o proper inference could be drawn from *duPont* that the grounds for issuing variances from the [BAT] limitations should also be the grounds for permitting individual point sources to depart from [BPT] standards. Indeed, our opinion recognized that 301(c) was designed for BAT limitations." *National Crushed Stone Ass'n.*, 449 U.S. at 73, n.13 (citation omitted). Just because variances may be granted from BPT limits on grounds that a source is "fundamentally different" from others in the category does not mean that the same arguments entitle

[15] As the Court explained, "The regulations for each subcategory contain a variance clause *applicable only to the [BPT] limitations*" 430 U.S. at 122-123 (emphasis added).

a source to a variance from BAT or pretreatment standards. (See discussion, pp. 33–35, *infra*).

Indeed, *duPont* struck down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards cover categories of sources, rather than individual point sources. Cf. §307(b)(3), 33 U.S.C. 1317(b)(3) with §306(b), 33 U.S.C. 1316(b). Pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id.* Pretreatment, like new source, standards may require "no discharge."[16] As with new source standards, it is "unlawful for *any* owner or operator of *any* source to operate *any* source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d) (emphasis added). Finally, there is no statutory provision for variances,[17] and a variance provision would be inappropriate because Congress intended pretreatment, like new source standards, to ensure national uniformity and maximum feasible control. See generally 430 U.S. at 138.[18] Thus, *duPont* does

[16] Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "*prevent* the discharge of *any* pollutant *** which *** interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

[17] Sources may be able to get a "credit" for pollutant removal occurring at the publicly owned treatment works, §307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

[18] EPA takes issue with *duPont's* distinction between new source standards and BPT limits. EPA asserts that BPT limits have, at times, required "no discharge" just like new source standards, and that BPT limits cannot be violated once they are incorporated in a permit either. (EPA Br. 22, n.15). This misses the point. New source standards are not interim measures like BPT. They force technology to the level of the best possible performer. Pretreatment standards, like BAT, serve the same function. 1977 *Legis Hist.*, *supra*, at 271, 342, 403, 461, 690. As noted earlier, pretreatment standards should "prevent, *to the maximum extent feasible*, the industrial pollutants from entering [the municipal sewage] plant in the first place." *Id.* at 690 (emphasis added).

CMA, on the other hand, argues that new sources are distinguishable from existing indirect dischargers on policy grounds. New sources have not yet been constructed, says CMA, so uniform standards will not require changes in technology, operation or processes for these plants. (CMA Br.

(footnote continues)

not give EPA broad authority to create variances from pretreatment or BAT standards. More important, *duPont* does not address Section 301(*l*), which was enacted after *duPont*. The question here, however, is the meaning of Section 301(*l*). *DuPont* has no bearing on this issue. Hence, petitioners' reliance on *duPont* is misplaced.

2. Section 301(*l*) of the Clean Water Act clearly prohibits FDF variances from pretreatment standards for toxic pollutants.

The essence of the Third Circuit's ruling is that Section 301(*l*) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.[19] The court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(*l*). (Pet. App. A40-A43).

Below, petitioners were united in their theory of this case. They now part ways. CMA argues that an FDF variance is not a "variance" at all, but rather "an individualized BAT limitation or standard, based on the application of the statutory BAT factors to that plant." (CMA Br. 28). Hence, says CMA, an FDF variance could not possibly "modify" a requirement of Section 301. CMA engages in sophistry. Once EPA pro-

(footnote continued)

21, n.22). This argument is specious. New sources can be just as variable in their processes as existing sources—or more so. Moreover, variability for new sources is more difficult to anticipate in a rulemaking because the companies which will be affected and the processes they will seek to construct may not yet be identifiable. In any event, it is up to Congress to decide whether variances from pretreatment and BAT standards for toxics should be prohibited as they are for new sources. Arguments as to whether Congress made the proper choice are irrelevant.

[19] 40 C.F.R. 403.13(b)(Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

mulgates a pretreatment standard, all sources in the affected industrial category must comply with a uniform, national standard unless they obtain an FDF variance. Whether the FDF alteration is called a "variance" or an "individualization," it "modifies" otherwise applicable requirements. See pp. 30–32, *infra*.

EPA initially agreed with CMA. Throughout this litigation—indeed, in its petition for certiorari—EPA argued that an "FDF variance does not 'modify' a requirement of Section 301 ***." (EPA Pet. 13). Now EPA concedes that "on first reading the statutory language appears to support the Third Circuit's analysis *** and an FDF variance 'modifies' such a [pretreatment] standard in the dictionary sense of the word, *i.e.*, it changes or alters it." (EPA Br. 24).

Instead, EPA now advances a new justification for ignoring the plain language of Section 301(*l*). EPA fabricates a conflict between Section 301(*l*)'s prohibition against "modifying" toxic limits for particular sources and EPA's duty to "revise" national pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change." Section 307(b)(2), 33 U.S.C. 1317(b). (EPA Br. 25).

EPA's new theory is a red herring. It confuses variances with periodic improvements to a rule. The dictionary defines "revise" to mean "correct," "improve," or "make *** up-to-date." *Webster's Third New International Dictionary* 1944 (1976). "Modify," on the other hand, has two senses. EPA mentions one, *i.e.*, "change," but omits mention of the other, "make more temperate and less extreme: lessen the severity of: moderate." *Id.* at 1452.

Congress used both senses of the word "modify" in the Clean Water Act to mean simply any change, such as a change in an industrial facility subject to the Act,[20] or a specific type of change, *i.e.*, a variance. It consistently used the latter sense of the word throughout Section 301—indeed, it did so twenty-

[20] *E.g.*, Section 208(b)(2)(C)(ii), 33 U.S.C. 1288(b)(2)(C)(ii), of the Act requires that areawide waste treatment management plans regulate the "location, modification, or construction" of polluting facilities.

five times. Each time Congress employed the word "modify" to create authority to vary pollution control requirements. Each time, it allowed EPA to tailor national standards to individual plants. Thus, a company could, under carefully circumscribed conditions, obtain relief from Section 301 requirements for economic reasons, Section 301(c), 33 U.S.C. 1311(c); water quality reasons, Section 301(g), 33 U.S.C. (Supp. V) 1311(g); or lack of a publicly owned treatment works to accept the company's wastes, Section 301(i)(2), 33 U.S.C. (Supp. V) 1311(i)(2). In addition, a publicly owned treatment works could obtain a reduction of Section 301 requirements for discharges to marine waters, Section 301(h), 33 U.S.C. (Supp. V) 1311(h), or lack of federal construction grant funds, Section 301(i)(1), 33 U.S.C. (Supp. V) 1311(i)(1).

Congress plainly understood "modify" in Section 301 to be synonymous with "variance:" it repeatedly equated the words "modification" and "waiver,"[21] and it called Section 301(c) a "variance" provision even though the language of that section speaks solely of "modified" pollution control requirements. 1977 *Legis. Hist.*, *supra*, at 461.

Because the latter legislative history is so at odds with EPA's position here, EPA tries to dismiss it as a "passing" reference during floor debate. (EPA Br. 28). The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed by the equation of the two terms in the Senate Committee Report.[22] Indeed, EPA itself used the words "variance" and "modification" interchangeably four times in its Senate testimony.[23] This Court,

[21] See, *e.g.*, the discussion of Section 301(c), 1977 *Legis. Hist.*, *supra*, at 328-329, 331; Section 301(g), *id.* at 328-329, 331, 355, 641, 674-676, 866, 876; and Section 301(h), *id.* at 320-321, 447-448, 639, 677-678, 859, 876, the economic capability, water quality, and ocean discharge waivers, respectively.

[22] *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

[23] EPA used the term "variance" to describe both the statutory 301(c) modification provision, *id.* at 1102, 1124, and the statutory 301(h) modification provision, *id.* at 1419, 1438.

too, has equated the two terms in construing the very section of the Clean Water Act at issue here.[24] In short, "modify" in Section 301 means a "waiver" or "variance" from pollution control standards.

There is no conflict between a ban against variances and the duty to revise national standards. There are, for example, no variances from the Clean Water Act's new source performance standards, *duPont*, 430 U.S. at 137-139, yet EPA must periodically revise these standards just like pretreatment standards. Section 306(b)(1)(B), 33 U.S.C. 1316(b)(1)(B). This Court has already ruled that "a variance is generally thought to be of specific applicability," whereas a revision may be general or specific depending on the circumstances. *Train* v. *NRDC*, 421 U.S. 60, 88-89 (1975). The instruction to revise pretreatment standards here was intended to avoid technological stagnation of national standards. It parallels the language Congress used to require EPA to update other nationally applicable rules after either periodic review of the rule or new developments in pollution control. Cf. Sections 301(d) (effluent guidelines) and 306(b)(1)(B) (new source standards), 33 U.S.C. 1311(d) and 1316(b)(1)(B), with Section 307(b)(2), 33 U.S.C. 1317(b)(2)[25].

Read together, these separate statutory provisions make EPA's obligations clear: EPA has a duty to develop the best national pollution control standards possible within the limits of current scientific knowledge. It has a concomitant duty to review these standards from time to time and update them to reflect new developments in technology. It cannot, however, make these national standards less stringent for individual plants, at least where toxics are concerned. This result may be decidedly inconvenient to EPA, but it is neither absurd nor unreasonable.

[24] In *National Crushed Stone Assn.*, this Court referred to the statutory 301(c) modification provision as a "variance." 449 U.S. at 71.

[25] Elsewhere in its brief, EPA acknowledges that revisions are more broadly applicable than variances. See, *e.g.*, EPA Br. 35, n.26: "Clearly *** this [revision] provision is intended to reflect periodic changes in the industry ***."

Since the statute is not ambiguous, EPA can't substitute its own interpretation for the plain words of Section 301(*l*). See *SEC* v. *Sloan*, 436 U.S. 103, 117-119 (1978). This is particularly true where, as here, EPA's interpretation of the statute does not square with the structure of the act itself. See *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272-275 (1968)(rejected narrow reading of statutory provision because it did not square with the structure of the statute). Nothing on the face of this statute authorizes EPA to read qualifying language into the plain words of Section 301(*l*)[26]. The statute does not say, "The Administrator may not, *pursuant to subsections (c) and (g) of this section*, modify any requirement of this section ***;"[27] it simply says there can be no modifications of any sort.

This Court has repeatedly held that an agency can neither enlarge upon, nor narrow, the terms of a statute. *Volkswagenwerk*, 390 U.S. at 273-275; *United States* v. *Calamaro*, 354 U.S. 351 (1957). Just because the act uses the word "modification" in Sections 301(c) and (g) does not mean that EPA can construe Section 301(*l*) to apply only to modifications under subsections (c) and (g). This construction of the statute would make Section 301(*l*) largely redundant—at least insofar as it applies to subsection (g), which, by its terms, cannot be applied to toxics.[28]

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[26] CMA contends that the general rulemaking authority contained in Section 501(a) of the Act, 33 U.S.C. 1361(a), constitutes independent statutory authority for the FDF variance, a claim that EPA itself does not advance. (CMA Br. 23). Section 501(a) authorizes the Administrator of EPA to "prescribe such regulations as are necessary to carry out his functions under this Act." Citation to Section 501(a) adds nothing to this case. This general grant of authority does not override the specific prohibition of Section 301(*l*). Moreover, the FDF variance may be an administrative convenience to EPA in the short run, but it is not "necessary" to development of pretreatment standards. See discussion, pp. 37–39, *infra*.

[27] Section 301(c), 33 U.S.C. 1311(c), allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), allows similar modifications to BAT standards where water quality warrants. EPA contends here that Section 301(*l*) applies only to subsections (c) and (g) of Section 301.

[28] Section 301(g) allows the Administrator to modify standards governing the discharge of any pollutant "other than *** toxic pollutants."

In addition, if Congress intended subsection (*l*) to apply primarily to subsection (c), it would have had no reason to move the ban against variances for toxics *out of* Section 301(c) and into a separate, more broad-reaching statutory section. Yet this is precisely what the conferees did. S. 1952, the bill reported out of the Senate Environment and Public Works Committee, added a proviso to the original economic variance provision in Section 301(c) in order to ban variances for BAT and pretreatment standards.[29] This provision passed the Senate intact. 1977 *Legis. Hist.*, *supra*, at 1076. The conferees deleted the proviso from Section 301(c). Instead, they added subsection (*l*) and reworded the ban on variances so that it applied not only to pretreatment and BAT standards, but to all requirements of Section 301, including any more stringent toxic effluent standards.[30]

Significantly, the conferees did not affix the new subsection (*l*) to Sections 43 through 46 of the Conference bill, which amended Section 301 of the law and were entitled "Waiver" or "Modification" provisions. 1977 *Legis. Hist.*, *supra*, at 203-207. Instead, they affixed subsection (*l*) to Section 53 of the Conference bill, entitled "Toxic Pollutants." *Id.* at 210-211. This section bypassed cumbersome rulemaking proceedings and listed the specific toxic pollutants of concern to Congress. It required each source of these pollutants to meet effluent limitations reflecting best available technology, and gave the Administrator authority to set even more stringent toxic effluent standards (or an outright prohibition on discharge) if warranted. It also made a series of other statutory changes, all intended to enhance control of toxics. *Id.* at 459-460. Congress's deliberate placement of Section 301(*l*) here, rather than in portions of the bill amending Section 301(c) of the

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[29] The proviso read: "[T]he Administrator may not modify the requirements of subsection (b)(2)(A) of this section [*i.e.*, the BAT and pretreatment standards] with respect to any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant ***." 1977 *Legis. Hist.*, *supra*, at 584.

[30] The Administrator has discretion to set toxic effluent limits more stringent than BAT if BAT is not effective against persistent, hazardous toxics. Sections 301(b)(2)(D)and 307(a), 33 U.S.C. (& Supp. V) 1311(b)(2)(D) and 1317(a).

law, further evidences Congress's intent that subsection (*l*) operate as a general ban on variances for toxics and not, as EPA contends, as a mere refinement of the conditions for obtaining a Section 301(c) economic variance.[31]

3. The legislative history of the Clean Water Act confirms that Congress intended to ban all variances, including FDF variances, from pretreatment standards for toxic pollutants.

Having decided that the language of Section 301(*l*) was clear, the court of appeals properly examined the legislative history to confirm its reading of the statute. *United States* v. *Culbert*, 435 U.S. 371, 374, n.4 (1978); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976); *United States* v. *Missouri Pacific Railroad Co.*, 278 U.S. 269, 278 (1929). The court found two overriding themes: first, the elimination of the discharge of toxic pollutants had always received special emphasis under the Act, increasingly so during the 1977 amendments. (Pet. App. A40). Second, Congress used the term "modification" interchangeably with "waiver" and "variance." Since Section 301(*l*) forbids modifications, the court reasoned, it forbids variances such as the FDF variance. (Pet. App. A41-A43).

EPA counters with two arguments. First, says EPA, Congress was primarily focusing on the statutory modifications which Congress had authorized [*i.e.*, Sections 301(c) and (g)], rather than on the FDF variance. Second, and in EPA's view "more telling," is the absence of any express indication that Congress intended to alter EPA's allegedly "well-established"

[31] EPA does not address the implications of moving the ban on variances for toxics out of subsection (c) and into a separate subsection. CMA does, but offers an explanation that is both ineffectual and wholly unsupported by citation to the legislative history. (CMA Br. 29-30). CMA hypothesizes that Congress consolidated the ban in subsection (*l*) to avoid repeating it in both subsections (c) and (g). If so, Congress's action was futile, because subsection (g) still contains an express prohibition on variances for toxics. Moreover, CMA ignores the fact that Congress not only moved the ban, it also amended the language so that subsection (*l*) now reaches beyond the BAT standards addressed in subsection 301(c). This makes it even more unlikely that Congress only had Section 301(c) in mind when it wrote Section 301(*l*).

and "well-known" practice of "granting FDF variances." (EPA Br. 28). Neither argument withstands analysis.

EPA's first point, that Congress's focus lay elsewhere, is simply a subterfuge for the lack of any legislative history to demonstrate that Section 301(*l*) limits only Section 301(c). EPA's case hinges on a single word in Congressman Roberts' floor explanation of the conference bill:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically*, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

1977 *Legis. Hist.*, *supra*, at 328-329 (emphasis added). This alone proves nothing. Congressman Roberts had no reason to list other examples of variances prohibited by section 301(*l*). Congress did not believe other variances were authorized, 1972 *Legis. Hist.*, *supra*, at 172, 309, and EPA had not yet promulgated an FDF variance for either pretreatment or BAT standards. (See discussion of EPA practice, p.28–29, *infra*). In any event, the impetus for restricting variances came from the Senate, and the conferees intended the more explicit discussions in the Senate Report to govern. 1977 *Legis Hist.*, *supra*, at 434.

The Senate Report plainly states: "In order to reemphasize that modifications to BAT are intended for non-toxic *** pollutants[32] only, the bill prohibits variances for [toxic] pollutants." 1977 *Legis. Hist.*, *supra*, at 677. Senator Muskie reiterated this point during the debate on the conference substitute: "*Like toxic pollutants for which there are no waivers or modifications*, there are no potential waivers or modifications for conventional pollutants." *Id.* at 458 (emphasis added).

[32] The Senate bill would also have allowed waivers for conventional pollutants, but this was deleted in conference in favor of "best conventional pollution control" requirements. See n. 4, *supra*.

The House, which accepted the Senate language in conference, understood the bill to contain a ban on waivers for toxics. Mr. Roberts said:

> Another major problem area was the law's strict requirements for industry that would cost millions of dollars and result only in a little more clean-up of our waters. The conferees wrestled with this problem and developed a fair and workable compromise. *Strict requirements are still in effect for damaging pollutants, such as toxics. However, for certain other pollutants, industry may get a waiver.*

Id. at 305 (emphasis added). Indeed, some House Members wondered aloud whether Congress had, by denying any waivers for toxics, gone too far: "[T]he classification of an extensive new listing of substances as 'toxic'—an action not taken in either the House or Senate versions of the bill—and *denial of any waiver with respect to these materials* can lead to new regulations more restrictive than any previously contemplated." *Id.* at 411 (emphasis added). These repeated assertions of no variances, waivers, or modifications for toxics contain no qualifying language.

To create an exception for the FDF variance, EPA must resort to inference. Even if this were a permissible way to read either the statute or the legislative history—and we submit it is not—the inference here does not fit the direction in which Congress sought to move the law. The 1977 amendments effected a "major redirection" of EPA's regulatory program in order to control toxics. *Id.* at 326, 454. Congress found "the only practical way" to solve this ubiquitous problem was "on an industry-by-industry basis *** [by] category or subcategory." *Id.* at 455. Variances for individual sources could only impede the effectiveness of this statutory scheme.

Thus, the 1977 amendments plainly sought to curtail EPA's authority to grant case-by-case variances from upcoming pollution control requirements. For example, Congress eliminated, at least for toxics, the only provision in the 1972 Act allowing modifications of BAT standards [*i.e.*, the economic capability waiver of Section 301(c)].[33] At the same time, Congress created only one new modification provision for BAT, the water quality variance of Section 301(g). It expressly precluded toxics from the reach of this variance and, even with respect to other pollutants, imposed strict conditions on its use, including possible filing of a bond or other security to assure compliance.[34] Finally, Congress refused to accept other variances such as a two year stay of requirements for industries, like the financially hard-pressed steel industry, vital to the "national interest." 1977 *Legis. Hist.*, *supra*, at 324.

It is inconceivable that Congress would have gone to such detail in specifying when and where variances could be created if, as EPA contends, it intended to leave open "the question [of] which changes are allowed and which are proscribed." (EPA Br. 26). Indeed, EPA's assertion that Section 301(*l*) must have been intended to rule out statutorily created variances, not "nonstatutory" variances such as the FDF violates a cardinal rule of statutory construction. Where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA* v. *Hill*, 437 U.S. 153, 188 (1978).

EPA argues that the well-settled rule of law restated in *TVA* v. *Hill* is "flatly inconsistent with *duPont*." (EPA Br. 30). EPA misconstrues both cases. *TVA* addressed the ex-

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[33] The Senate wanted to extend this ban to nonconventional pollutants, those in the gray area between toxics and conventionals, as well, but abandoned this point in conference only "in order to obtain action on this legislation." 1977 *Legis. Hist.*, *supra*, at 429.

[34] To qualify for a Section 301(g) variance, a source must show: 1) that it will comply, at a minimum, with any applicable BPT, secondary treatment, state law, or water quality requirements; 2) that a variance for this source will not result in any additional requirements for any other source; and 3) that a variance will not adversely affect human health or the environment. In addition, while its application is pending, the source must continue to comply with the standards from which a variance is sought unless the Administrator grants a stay after finding that there is a substantial likelihood the application will succeed on the merits. If the Administrator so finds, he may condition a stay on the filing of a bond or other security to assure timely compliance in the event that the variance is denied. 33 U.S.C. (Supp. V) 1311(g) and (j).

ceptions to a statutory rule; *duPont* wrestled with Congress's silence on what the rule itself should be. *DuPont* was precipitated by the Clean Water Act's failure to say whether BPT limits should be set nationally or case-by-case. The Act appeared to warrant national standards akin to BAT and new source standards, but it used different language to describe the BPT limits. The BAT provisions focused on "categories and classes" of sources; the BPT provisions spoke of individual "point sources". *DuPont* resolved the tension between the ambiguous language of Section 301 and the overall thrust of the statute with a hybrid resolution of the issue. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128.

DuPont did not, as EPA claims, hold that nonstatutory variances are appropriate for either BAT or any other standards. To the contrary, the court struck down a nonstatutory variance for new source standards, *id.* at 137-139, and it upheld EPA's BAT limits even though they did not contain an FDF variance clause. *Id.* at 122-123. Hence *duPont* and *TVA* are not inconsistent. Both cases underscore that EPA may not create exceptions to Section 301(*l*)'s ban on variances from national pretreatment standards.

EPA nonetheless frames the question before this Court as follows: did Congress intend to reverse *duPont*?[35] This misses the mark. *DuPont* only approved FDF variances for *BPT limits*. The BAT regulations then before the Court did not contain an FDF variance clause. The Court appropriately assumed that the only BAT variance was the economic capability waiver under Section 301(c) of the Act, and it limited its discussion of BAT variances to Section 301(c).

Congress did address this aspect of *duPont* in 1977: it eliminated Section 301 variances for toxics. 1977 *Legis. Hist.*, *supra*, at 328. Of course, Congress was fully cognizant of the

[35] EPA cites *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) to no avail. The traditional admiralty rule at issue there was both well-settled and well-known. In *Edmonds*, unlike here, there could be no question that Congress acted with the rule in mind.

many arguments that would be put before reviewing courts to find the BAT standards variable. That is why it created Section 301(g) variances:

> The bill intends to give the Administrator of EPA a *safety valve in the event that the courts find he does not have flexibility in administering the 1983 [BAT] requirements* for industries. It authorizes a case-by-case exemption for industries which demonstrate, to the satisfaction of the Administrator, that pollutants in their discharge are not toxic *** [and] will not interfere with the attainment of the national water quality standard ***.

Id. at 674 (emphasis added). But Section 301(g), like 301(c), variances were not available for toxics. *Id.* The intent is clear: Congress did not want EPA to vary toxic BAT and pretreatment standards. It did not need to reverse *duPont* to accomplish this. *DuPont* is fully consistent with a ban on variances for pretreatment and BAT standards.

EPA's final argument is that Congress, by its inaction, ratified the agency-created FDF variance. This Court has, however, previously ruled that silence is, at best, a "treacherous" guide to Congressional intent; Congress's inaction may betoken nothing more than unawareness or preoccupation with other issues. *Zuber* v. *Allen*, 396 U.S. 168, 185-186, n. 21 (1969).

This case, more than most, illustrates the wisdom of that maxim. EPA cannot show that Congress was *actually* aware of EPA's creation; to the contrary, EPA concedes that the legislative history is "devoid of any reference" to the FDF variance. (EPA Pet. 14). Instead, EPA argues that Congress must have known, exaggerating how "well-entrenched" the variance was in EPA practice. (EPA Br. 29). EPA's argument flouts the facts. Only two of 4,000 sources covered by BPT effluent guidelines had actually received an FDF variance by 1977.[36] EPA did not deem the variance sufficiently noteworthy

[36] *Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2741 (1983) [hereinafter cited as 1983 *Hearings*].

to mention in testimony to either the House, 1977 *Legis. Hist.*, *supra*, at 1399-1472, or the Senate, *id.* at 1093-1139.[37]

True, EPA had regulations which, though largely not invoked in practice, had at least theoretically established FDF variances from BPT limits. But this Court has previously ruled that the mere existence of agency regulations is not a sufficient basis from which to presume Congress's knowledge of their content. *United States* v. *Calamaro*, 354 U.S. 351 (1957). It has even refused to infer Congressional approval of agency action in the face of express indications that Congress knew of the action. *TVA* v. *Hill*, 437 U.S. 153 (1978); *SEC* v. *Sloan*, 436 U.S. 103, 121-123 (1978)(Senate Committee Report not sufficient indication of widespread Congressional awareness). It does not necessarily follow that because EPA had regulations, Congress knew of them.

Nor would *duPont* have warned Congress that it needed to renounce FDF variances for BAT and pretreatment standards by name. First, *duPont* did not, as EPA claims, prominently discuss FDF variances. (EPA Br. 29). As noted earlier, *duPont* resolved the broader question of whether EPA could even set industry-wide regulations under the Clean Water Act. A few sentences in that opinion mention the existence of a variance, but the Court otherwise declined to address its content or proper scope. Congress focused on the case's broad holding: as one Member said, it "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318.

More important, while *duPont* discussed BPT and BAT rules, it approved an FDF variance only for BPT. As noted earlier, the rules reviewed in *duPont* contained an FDF variance clause applicable only to the BPT rules. In 1977,

[37] By contrast, Congress was made aware of the FDF variance during the current reauthorization of the Clean Water Act. EPA brought the issue prominently to Congress's attention, asking the House Subcommittee on Water Resources to reverse the Third Circuit's decision. 1983 *Hearings* at 2705-2706, 2724-2726, 2740-2741, 2747-2748. The House passed a bill which declined to do so. H.R. 3282, 98th Cong., 2d Sess. (1984). The bill reported out of the Senate Environment and Public Works Committee the day after the Third Circuit's decision does not contain authority for FDF variances either. S. 431, 98th Cong., 1st Sess. (1983).

however, Congress focused on BAT, not BPT. BPT was merely an interim, "time-limited" measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. BPT controlled conventional pollutants, not toxics; any toxic removal it obtained was purely incidental to its primary purpose. *Id.* at 335, 1101. By 1977, most sources had complied with BPT, *id.* at 641, and the pollution control results had been greater than anticipated. *Id.* at 330. Therefore, in the reauthorization, Congress's attention shifted sharply toward toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 335-336, 454-455, 689-691, 1135-1136. Since Congress considered, and curtailed the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

EPA notes that BPT regulations sometimes apply to toxics, citing the rules at issue in *duPont* and in an agency decision granting an FDF variance to a steam electric plant. (EPA Br. 30). EPA infers that if Congress had intended to ban FDF variances for toxics, it would have criticized this aspect of *duPont*. Nothing in *duPont*, however, suggests this fact to Congress and the cited agency decision is unpublished. This is a slim reed on which to rest an argument that Congress's failure to act makes new law. Congress knew that BPT would have "incidental benefits in control of toxics in some industries." EPA had told it so, but had also warned that "even with BPT controls there will continue to be major discharges of toxic pollutants, many of which are potential threats to public health." 1977 *Legis. Hist.*, *supra*, at 1101. In BAT, Congress committed to a second, major, and more stringent phase of technology-based controls. *Id.* at 454-455. Its failure to direct EPA to spend scarce resources wringing more out of BPT for a few plants when BAT would shortly be on line for all is not significant.

In any case, it defies logic to say, as EPA apparently does, that because EPA had adopted an FDF variance for one purpose (*i.e.*, for modifying BPT limits), Congress acquiesced in the use of the variance for other purposes, such as adjusting pretreatment or BAT standards. This Court has

already ruled that Congress will not be presumed to have adopted an agency's construction of a statute when the construction does not apply to the precise conditions passed on prior to re-enactment. *United States* v. *Missouri Pacific Railroad Co.*, 278 U.S. 269, 279-280 (1929). See also *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959).

EPA had a well-established practice in 1977 of distinguishing in its regulations between BPT limits, on the one hand, and pretreatment and BAT standards, on the other, for variance purposes. BPT regulations contained FDF variance provisions; pretreatment and BAT standards did not. By the end of 1977, EPA had promulgated pretreatment standards for 21 industrial categories. None contained an FDF variance.[38] Likewise, EPA had promulgated at least twenty-one BAT standards. These, too, lacked an FDF variance.[39]

[38] In five industrial categories, the agency set numerical limits for a specific pollutant or pollutants without establishing any variances. 41 Fed. Reg. 53930-53938 (Dec. 9, 1976) (timber products processing); 42 Fed. Reg. 15684 - 15690 (Mar. 23, 1977) (petroleum refining); 42 Fed. Reg. 15690 - 15696, (Mar. 23, 1977) (steam electric); 42 Fed. Reg. 35834 - 35843 (July 12, 1977) (electroplating); 42 Fed. Reg. 37294 - 37301 (July 20, 1977) (inorganic chemicals manufacturing). In sixteen industrial categories, the agency declined to set specific pollutant-by-pollutant limits. The agency held these industries only to the general "prohibited wastes" standard of 40 C.F.R. 128.131; that is, they could not discharge wastes which would "interfere with the operation or performance" of the municipal sewage treatment plant. 38 Fed. Reg. 30982 - 30984 (Nov. 8, 1973). At the same time, the agency determined that the BPT-level effluent limitations applicable to direct dischargers did not apply to indirect dischargers in the same industrial category. 40 Fed. Reg. 6432 - 6447 (Feb. 11, 1975) (dairy products processing; grain mills; canned and preserved fruits and vegetables processing; canned and preserved seafood processing; beet and liquid and crystalline cane sugar processing; cement manufacturing; feedlots; organic chemicals manufacturing; soap and detergent manufacturing; glass manufacturing; asbestos manufacturing; pulp, paper and paperboard; meat products; builder paper and roofing felt segment of the builders paper and board mills); 40 Fed. Reg. 55770 - 55801 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272 - 16286 (Apr. 16, 1976) (canned and preserved fruits and vegetables processing); 42 Fed. Reg. 15696 - 15704 (Mar. 23, 1977) (leather tanning); 42 Fed. Reg. 26979 - 26984 (May 26, 1977)(textile mills).

[39] *E.g.*, 39 Fed. Reg. 4034-4038 (Jan. 31, 1974) (sugar processing); 39 Fed. Reg. 5704-5708 (Feb. 14, 1974) (feedlots); 39 Fed. Reg. 5712-5719

(footnote continues)

Several early pretreatment and BAT rulemakings presented the very facts which EPA now uses to justify an FDF variance (*i.e.*, unique plants within a larger industrial category). In each case, EPA resolved industry's concern without resort to an FDF variance. It chose a variety of tools. In some cases, it created a new subcategory;[40] in others, it told sources to avail themselves of the economic variance contained in section 301(c) of the Act.[41] In still others, it emphasized that pretreatment and BAT standards (unlike BPT) would be revised and encouraged sources to participate in the revision.[42] Throughout, EPA applied FDF variances only to BPT limits.

(footnote continued)

(Feb. 14, 1974) (glass manufacturing); 39 Fed. Reg. 6590-6594 (Feb. 20, 1974) (cement manufacturing); 39 Fed. Reg. 7526-7533 (Feb. 26, 1974) (asbestos manufacturing); 39 Fed. Reg. 7894-7906 (Feb. 28, 1974) (meat products); 39 Fed. Reg. 9612-9635 (March 12, 1974) (inorganic chemical manufacturing); 39 Fed. Reg. 10512-10518 (March 20, 1974) (grain mills); 39 Fed. Reg. 10862-10868 (March 21, 1974) (canned and preserved fruits and vegetables processing); 39 Fed. Reg. 11510-11514 (March 28, 1974) (electroplating); 39 Fed. Reg. 12502-12522 (April 5, 1974) (plastics and synthetics); 39 Fed. Reg. 13370-13393 (April 12, 1974) (soap and detergent manufacturing); 39 Fed. Reg. 14676-14683 (April 25, 1974) (organic chemical manufacturers); 39 Fed. Reg. 16578-16581 (May 9, 1974) (builders paper and roofing felt segment of the builders paper and board mills category); 39 Fed. Reg. 18594-18609 (May 28, 1974) (dairy products processing); 39 Fed. Reg. 18742-18752 (May 29, 1974) (pulp, paper and paper board); 39 Fed. Red. 24114-24130 (June 28, 1974) (iron and steel manufacturing); 39 Fed. Reg. 24736-24749 (July 5, 1974) (textile industry); 40 Fed. Reg. 4582-4607 (Jan. 30, 1975) (canned and preserved seafood processing); 40 Fed. Reg. 55770-55801 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272-16286 (Apr. 16, 1976) (canned and preserved fruits and vegetable processing).

[40] *E.g.*, 39 Fed. Reg. 24736 (July 5, 1974).

[41] *E.g.*, 40 Fed. Reg. 55770, 55776 (Dec. 1, 1975).

[42] *E.g.*, EPA designated the timber product processing pretreatment rules "interim final" and simply solicited more information for the final round of rulemaking: "[T]here may be specific situations where the costs may be underestimated. However, these costs are considered average. The Agency solicits the submission of cost information to support the contention that the costs presented are too low." 41 Fed. Reg. 53930, 53933 (Dec. 9, 1976). See also 40 Fed. Reg. 55770, 55776 (Dec. 1, 1975).

In 1977, EPA rethought the matter and proposed to adopt FDF variances for future pretreatment standards. 42 Fed. Reg. 6476, 6497 (Feb. 2, 1977). It never notified Congress of its potential change of heart, nor did it resolve the matter at any time during 1977 when EPA's new policy could have been brought to the attention of Congress.[43] Instead, EPA continued to deliberate until mid-1978, when it first announced that it would allow industry to obtain FDF variances from all pretreatment standards.[44] Shortly thereafter, EPA proposed to establish FDF variances from BAT standards also,[45] a proposal that was not adopted until mid-1979.[46]

EPA surely can't argue that Congress ratified its *proposed* rule, for this would amount to adopting an agency's thinking before the agency had itself completed or committed to the thought. Instead, EPA asks this Court to infer that Congress, by its silence, ratified FDF variances for pretreatment standards even though the agency had never mentioned such a variance to Congress; no source had ever applied for a pretreatment variance; the variance did not exist in any pretreatment rule or regulation of the agency; and the only regulations then on the books distinguished between BPT limits, where the variance was allowed, and pretreatment and BAT standards, where it was not. The argument is absurd on its face. If Congress ratified any practice in 1977, it was the absence, not the presence, of an FDF variance for pretreatment and BAT standards.

4. FDF variances for toxic pretreatment standards are not reasonable given the purposes of the Clean Water Act.

a. Lacking a compelling legal argument, EPA turns to policy, alleging first that an FDF variance serves a different purpose than a Section 301(c) variance. Put simply, this argument supposes that an FDF variance is not a "variance"

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[43] As noted earlier, the agency's testimony before Congress never referred to the FDF variance. 1977 *Legis. Hist.*, *supra*, at 1093-1139, 1399-1472.

[44] 43 Fed. Reg. 27736, 27757 (June 26, 1978).

[45] 43 Fed. Reg. 37078, 37088, 37132 - 37134 (Aug. 21, 1978).

[46] 44 Fed. Reg. 32854, 32893 - 32894, 32950 - 32951 (June 7, 1979).

at all, but rather a part of the standard-setting process in which EPA corrects prior errors. An FDF variance simply sets a BAT or pretreatment standard for an individual plant, says EPA, while a Section 301(c) variance excuses compliance with a requirement applicable to the larger class of dischargers.

This is a distinction without a difference. In *National Crushed Stone Assn.*, 449 U.S. at 74, this Court found that a Section 301(c) variance performs the precise role EPA ascribes to an FDF variance: it "creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class."[47]

Section 301(c) is a reexamination of BAT factors for an individual source. It does not matter whether the reexamination is triggered because an individual source is simply a more marginal operation than others in the same industry or because the factors that determine BAT (*i.e.*, raw waste load, discharge volume, energy requirements, age, process configuration) at a single plant are sufficiently different that the cost of achieving BAT-level performance is no longer affordable. In either case, Congress said there could be no escape from uniform BAT requirements for toxics because of inability to pay for available controls. It would be ironic indeed for Congress to have permitted the same result by reexamination of the factors contributing to a source's economic difficulty. Both FDF and Section 301(c) variances set either a new BAT or pretreatment standard for a single source. Both excuse the source from an otherwise applicable national standard. The

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[47] EPA focuses on this Court's discussion of the different eligibility criteria for each variance: Section 301(c) asks whether a modification "will represent the maximum use of technology within the economic capability of the owner or operator ***," 33 U.S.C. 1311(c), while an FDF variance addresses the statutory factors relevant to BPT. 449 U.S. at 78. This distinction does not, however, invalidate the Court's statement that the two variances serve the same purpose; it simply underscores the fact that *BPT and BAT limits* differ. As this Court explained, the Section 301(c) factors bear a substantial relationship to the considerations underlying BAT; they would, however, be inapposite in the BPT context because they would not apply the general requirements to an individual point source. *Id.* at 75.

two serve the identical function. It makes no sense to assume that Congress prohibited one, and not the other, for toxics.

b. EPA next claims that an FDF variance is "substantively indistinguishable" from either subcategorizing an industry during the rulemaking or revising a final rule. (EPA Br. 35-36). EPA mixes apples and oranges. Procedure aside, there are two striking differences between establishing special categories for a *group* of plants within a larger industrial category *before* issuing a rule and granting *individual* plant variances from a *final* standard. The first lies in the scope of the decision; the second, in its timing.

EPA here characterizes the FDF variance as a standard for either a plant or a group of plants (and thus akin to a subcategory), but the rule is actually designed for a single "Industrial User *within* *** [a] *subcategory*." 40 C.F.R. 403.13(b). (Pet. App. A122). It seeks data specific to the industrial variance applicant without regard to whether or not there are other similarly situated sources within the subcategory. It does not appear to recognize any connection between the information produced in the variance proceeding and the control requirements of the larger industrial category. If, for example, a variance requires more stringent controls for a particular facility (there have never been any such variance requests although EPA maintains their theoretical possibility), the rules do not seem to require EPA to decide whether to order further process changes in other sources or otherwise upgrade the standards to the level of this "best performer." The FDF variance is, in essence, a single plant evaluation designed primarily to waive control requirements for a single source.

Congress gave EPA some discretion to differentiate among sources within a category—it recognized, for example, the possibility of a "subcategory," 1977 *Legis. Hist., supra*, at 455—but not without limit. It did not give EPA carte blanche to entertain single plant evaluations. Congress wanted to avoid hobbling the standard-setting process with atypical concerns:

> [T]he pretreatment standards *** [should] be national in scope and addressed to the most significant pre-

> treatment problems. The Committee expects that the standards would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator.

1972 *Legis. Hist., supra*, at 800.

Pretreatment standards set control requirements for indirect dischargers comparable to BAT for direct sources. 1977 *Legis. Hist., supra*, 271, 342-343, 403, 461, 690-691. Thus, EPA should weigh the factors relevant to pretreatment standards, like those for BAT, only across whole industrial classes or categories:

> The Conferees intend that the factors described in section 304(b) be considered *only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class. Except as provided for in section 301(c) of the Act*, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.

1972 *Legis. Hist., supra*, at 172 (emphasis added).

Congress expressly cautioned against single plant evaluations:

> The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.
>
> Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, *it should be avoided*.

Id. at 255. (emphasis added).

This caution took on added importance in the context of

BAT because Congress intended BAT to be more technology-forcing than BPT. 1972 *Legis. Hist.*, *supra*, at 170, 1468. BPT was geared to "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." *Id.* at 169. Congress pegged BAT, by contrast, to "the best performer in any industrial category." *Id.* at 170.

It stands to reason that, in coming up to the level of the best performer in a category, individual plants might incur costs, energy requirements, or process disruptions wholly out of proportion to others, especially where local officials had previously required little pretreatment. Congress recognized that some plants might close, not just because they were less able to pay for pollution controls than others, but also because they would be required to make more "significant advancements in their levels of pretreatment" than others within the same industry. 1977 *Legis. Hist.*, *supra*, at 404.

Congress did not authorize less stringent standards for these plants (except for Section 301(c) variances for nontoxics). For toxic pretreatment standards, it insisted on state-of-the-art technology, suggesting other options such as removal credits or municipal pretreatment to shift the burden of control where feasible. *Id.* at 690-691. It remained, however, steadfast in its goal: "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." *Id.* at 690.

An FDF variance has no place in this technology-forcing scheme because it allows some sources to escape "best performance" levels for reasons that have nothing to do with what technology can achieve. For example, one strong indication that EPA has gone awry in transferring the FDF variance from the BPT to the pretreatment and BAT contexts lies in the agency's treatment of the cost factor. EPA told sources they could request an FDF variance for a "removal cost *** *wholly out of proportion to the removal cost* considered during development of the Standards ***." 40 C.F.R. 403.13(c)(2)(iv)(A)(Pet. App. A123) (emphasis added). EPA took this language virtually intact from BPT standard-setting where Congress told EPA to do a "limited cost-benefit

analysis" to ascertain whether "the additional degree of effluent reduction is *wholly out of proportion to the costs* ***." 1972 *Legis. Hist.*, *supra*, at 170. (emphasis added). Where costs are significantly greater than normal, the cost-benefit calculus for BPT changes.

For BAT and pretreatment, however, Congress adopted an entirely different cost test: "what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and *what is achievable through the application of available technology—without regard to costs.*" *Id.* (emphasis added). EPA has consistently defined BAT as that technology which is affordable across a whole industrial category. Comparative costs are not relevant to this inquiry.[48] Hence, EPA's FDF variance rules are out of place in the BAT context.

A second critical difference between the FDF variance and subcategorizing during a rulemaking is the timing of the decision on pollution control requirements. Here Congress left EPA no discretion. Congress wanted industry's pollution control obligations defined quickly. It gave EPA only nine months to set pretreatment standards.[49] It gave industry no more than three years from the date of promulgation to comply. Section 307(b), 33 U.S.C. 1317(b).

If sources are to meet this timetable, they have to embark at once on all the steps necessary to attain compliance—preliminary engineering, obtaining bids, awarding construction contracts, purchasing major equipment components, construction, trial operation, performance testing, and fine-tuning. The advanced technology required by these standards is, after all, hardly an off-the-shelf consumer item.

An FDF variance is antithetical to this timetable. FDF variance applicants must wait close to a year in the best of cases—considerably more on the average—to know their

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[48] By contrast, comparative costs—both among industries and between industries and municipalities—are relevant to "best conventional pollution control technology" requirements, 1977 *Legis. Hist.*, *supra.*, at 458, but there is no economic capability waiver from these requirements. *Id.* at 461.

[49] This deadline has been extended by the district court on several occasions, see n. 5, *supra*.

pollution control obligations.[50] If they wait for the variance to be resolved, they will miss the compliance deadline. If they do not wait, the variance is purely illusory. Nothing could be further from the scheme Congress had in mind.

An FDF variance is closer in timing to amendment or revision of a rule—at least each takes place after the rule is issued. They are not, however, "substantively indistinguishable." Because amendments or revisions are designed to effect changes in a rule, they are subject to the same constraints as the initial rulemaking; that is, they must address classes and categories of sources, not single plants.

Revisions also differ procedurally. The Clean Water Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place. Section 307(b)(1), 33 U.S.C. 1317(b)(1). Congress wanted quick, direct, and uniform corrections to erroneous or outdated rules.[51] The FDF variance, by contrast, is a Rube Goldberg contraption. It may entail review by as many as four separate tiers of government,[52] an

[50] EPA's FDF variance rules outline the following minimal procedures: 180 days from the effective date of the standard (longer if a "category determination request" is made) to apply for a variance; an unspecified amount of time for the agency to review the application, set the administrative machinery in motion, and notify the public that an application is pending; at least 30 days for public comment on the application; and an unspecified amount of time for either the State or the EPA regional enforcement division director to weigh the public comments and decide the request. If the request is denied, the following additional procedures may be invoked: 30 days to request a hearing from the Regional Administrator, some again unspecified time for the Regional Administrator to review the enforcement division director's decision and determine whether to hold a hearing, 30 days to appeal to the Administrator (apparently only if the hearing request is denied), additional time for the hearing itself, and an unspecified amount of time for either the Regional Administrator or the Administrator to render a decision. 40 C.F.R. 403.13(g) and (j) to (m) (Pet. App. A122-A127).

[51] For example, sources have only 90 days to ask a court to remand an erroneous EPA rule, unless they can show that their challenge is based on information arising after 90 days. Section 509(b)(1), 33 U.S.C. 1369(b)(1).

[52] An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator and the EPA Administrator. 40 C.F.R. 403.13. (Pet. App. A122).

informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel. (See procedures described in n. 50, *supra*). Not surprisingly, the process has proved extraordinarily slow of resolution.[53]

EPA scoffs at this procedural issue, shielding its inept handling of FDF variance applications behind *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). EPA claims that, according to *Vermont Yankee*, an agency is free to choose its own rulemaking procedures. CMA cites *SEC* v. *Chenery*, 332 U.S. 194 (1947) for the same general proposition. Petitioners take both *Vermont Yankee* and *Chenery* too far. These cases are irrelevant where, as here, Congress has made the choice for EPA.

c. EPA also pleads that it needs an FDF variance because its final pretreatment standards may not always reflect the full range of factors the Administrator was supposed to consider. (EPA Br. 31). This could occur in one of three situations: when EPA overlooks information in its possession, when it is ignorant of information available to industry, or when relevant information is simply unavailable at the time of rulemaking.

The first situation occurs when EPA errs: it simply fails to consider information presented to it in a rulemaking. EPA cites two such cases in its brief. In *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979), EPA fell back

[53] EPA fabricates an inconsistency in NRDC's position on FDF variance procedures, alleging that NRDC wavers between calling the procedures too summary and too slow. (EPA Br. 36 and 34-35, n.26). EPA swings at its own straw man. See Transcript of Oral Argument in Court of Appeals at 249. NRDC has never said EPA would—or should—issue variances without public notice; it has simply said, correctly, that EPA's public notice procedures for FDF variances are laxer than those required for setting pretreatment standards because proposed variances need not be published in the Federal Register as proposed rules must clearly be. 5 U.S.C. 553. Thus, the notice procedures illustrate one more deviation from the route Congress mapped out for the agency. Whichever approach to public notice EPA takes, however, the reality remains that an after-the-fact definition of pollution control requirements is both slower and more cumbersome than what Congress had in mind.

on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking. 43 Fed. Reg. 29771 (1978).[54] Likewise, in *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1061 (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978), EPA proferred the FDF variance in response to industry criticism of its data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking. 39 Fed. Reg. 24114, 24115 (1974)(discussing sinter plants).[55]

In these situations, the FDF variance is nothing more than a fig leaf for inadequate agency rulemaking. This Court need not sanction such obviously flawed rulemaking. Congress wanted EPA to do an adequate job during rulemaking.[56] It told EPA to be "precise" with effluent guidelines so that effluent limits would be uniform and, hence, universally applicable. 1972 *Legis. Hist.*, *supra*, at 172, 309. The FDF variance thwarts this scheme.

In addition, reliance on the so-called "safety valve" of the FDF variance makes EPA's rules more, not less, vulnerable to challenge. EPA, in effect, puts its eggs in a basket it doesn't control. If a source contests the pretreatment standards on the merits rather than in a variance proceeding, EPA runs the risk that its rules will be overturned for failure to respond to relevant rulemaking comments. See, *e.g.*, *Portland Cement Ass'n.* v. *Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974), reh. denied, 423 U.S. 1092 (1976). The weight of each rulemaking comment turns on its

[54] This flaw did not prove critical. *Kennecott* upheld the BPT standards, relying in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the availability of the FDF variance as a safety valve. 612 F.2d. at 1243.

[55] *AISI* accepted the adequacy of the FDF variance as a safety valve for this error in the *BPT* rules. *AISI* did not address FDF variances from BAT standards as the BAT rules at issue in *AISI* did not contain an FDF variance clause. 39 Fed. Reg. 24114-24130 (1974). Nor did *AISI* address Section 301(*l*), which it predated.

[56] Senator Muskie, for example, explained: "[T]here are no waivers or modifications ***. An adequate consideration of costs is made at the time of promulgation of the effluent guidelines". 1977 *Legis. Hist.*, *supra*, at 458.

validity, not on whether it is supported by few or many sources. Hence, it is far safer for EPA to be careful during, not after, the rulemaking.

A second type of error occurs when industry fails to bring relevant information to EPA's attention during a rulemaking. An FDF variance does not cure this type of error; it abets it. The variance gives industry an incentive to treat the rulemaking more casually. If a company fails to produce relevant information, it will have a second bite at the apple in a variance proceeding. Without the variance, industry must come forward with all relevant information during a rulemaking. Where it fails to do so, the courts will not entertain a challenge to the rule. *E.g.*, *Kennecott* and *AISI*.[57] In addition, EPA is not totally at industry's mercy. Congress gave EPA broad authority to obtain from industry whatever information it needs to issue pretreatment standards. Section 308, 33 U.S.C. 1318.

Finally, EPA can issue rules which become dated in the wake of new information. EPA does not need an FDF variance for these situations either. As EPA concedes, it already has authority—indeed, is required—to revise its rules when this occurs. Section 307(b)(2), 33 U.S.C. 1317(b)(2). In short, the FDF variance is at best useless and at worst positively detrimental to EPA's overall standard-setting effort.

d. EPA also claims that the Third Circuit's decision could disrupt implementation of the Act. It might, says EPA, endanger existing regulations, presumably because some companies will try to reopen rules issued in partial reliance on the availability of an FDF variance as a safety valve. (EPA Br. 37). There will, however, be few, if any, opportunities to do so. EPA's rules required plants to apply for their variance within 180 days of the effective date of a pretreatment standard. (Pet. App. A122, A124). By September 1983, the date of the Third Circuit's decision, only 12 companies had

[57] Both *Kennecott* and *AISI* rejected industry challenges based on information not presented to EPA during the rulemaking (*e.g.*, ferrocyanide formation, 612 F.2d at 1245; water scarcity, 526 F.2d at 1050; and engineering factors, 526 F.2d at 1049).

met the FDF variance application deadline.[58] These companies can still take advantage of any relevant information which could not have been brought to EPA's attention during the rulemaking. Section 509(b)(1), 33 U.S.C. 1369(b)(1).[59] The FDF variance, by contrast, could prove very disruptive since CMA forecasts that some companies will apply well beyond the 180 day application deadline in EPA's current rules—indeed, well after the deadline for complying with the applicable pretreatment standard. (CMA Br. 38, n.62).

EPA also claims that it may have to delay issuing future standards if it cannot rely on the FDF variance as a safety valve. (EPA Br. 37-38). This, too, is hyberbole. Since the Third Circuit's decision, EPA has issued six final[60] and four proposed pretreatment standards.[61] All were issued on or about the agency's deadline (*i.e.*, the date established in the Consent Decree).[62] Since EPA has apparently had no problem

[58] The filing deadline had expired for ten of thirteen pretreatment standards issued after EPA created the variance. These standards covered 11,316 (83%) of the 13,696 sources subject to categorical pretreatment standards. Of the 12 variance applicants, one company requested variances for two plants; another, for 24 plants. (Br. in Opp. App. A5-A7).

[59] An FDF variance is not subject to this restriction; it can cover any facts, including those which could easily have been brought to EPA's attention during a rulemaking. However, no useful purpose would be served—indeed it would delay enforcement of this program—to allow sources to raise new excuses for noncompliance from final rules. The restriction is therefore both wise and equitable, even as applied to the 12 companies possibly affected by the Third Circuit's decision.

[60] 48 Fed. Reg. 49126-49171 (Oct. 24, 1983) (aluminum forming); 48 Fed. Reg. 49808-49831 (Oct. 27, 1983) (pharmaceutical manufacturing); 48 Fed. Reg. 52380-52400 (Nov. 17, 1983) (coil coating); 48 Fed. Reg. 55690-55705 (Dec. 14, 1983) (electrical and electronic components); 49 Fed. Reg. 8742-8831 (Mar. 8, 1984) (nonferrous metals manufacturing); 49 Fed. Reg. 9108-9152 (Mar. 9, 1984) (battery manufacturing).

[61] 48 Fed. Reg. 49408-49436 (Oct. 25, 1983) (inorganic chemicals manufacturing); 49 Fed. Reg. 5862-5883 (Feb. 15, 1984) (plastics molding); 49 Fed. Reg. 8112-8182 (Mar. 5, 1984) (nonferrous metals and iron and steel/copper/aluminum metal power production and powder metallurgy); 49 Fed. Reg. 26352-26483 (June 27, 1984) (nonferrous metals manufacturing).

[62] EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. See n 5, *supra*. Administrator Ruckelshaus signed all of the above-referenced standards within a month of this deadline and all but two within a week of the deadline. The standards appeared in the Federal Register shortly thereafter.

issuing rules in the absence of an FDF variance, there is no reason to believe it will develop a problem in the future. EPA has not, for example, had a problem issuing either new source performance standards or new source pretreatment standards, yet neither are eligible for an FDF variance.

Moreover, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA. This does not add a new feature to EPA rulemaking; EPA routinely considers unique features of individual plants in rulemaking for both direct and indirect dischargers, notwithstanding its desire to focus on the more "typical" plants. (EPA Br. 37). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.[63] Eliminating the FDF variance simply closes off another avenue for raising the same concerns. It frees EPA to concentrate its resources on rulemaking, rather than dispersing them throughout variance proceedings and litigation over variance applications.

e. There are sound policy reasons for avoiding FDF variances. Understanding what makes one plant's performance different from others may be a key to improving the performance of all. Thus, considering this issue in the rulemaking may actually enhance the technology-forcing nature of the standard.

In addition, it is far more efficient to decide whether plants are different or similar to the rest of an industrial

[63] See, *e.g.*, *Association of Pacific Fisheries* v. *EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1980) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp.*, 612 F.2d at 1246 (subcategorization of two mills was arbitrary); *American Iron and Steel Institute*, 526 F.2d at 1050-1051 (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).

category during, not after, a rulemaking. During the rulemaking, the standard-setters can frame the options for decision when the data base is still fresh before them. By contrast, EPA's FDF variance procedures require state and regional enforcement personnel to make the same decisions on the basis of a rulemaking record which is unfamiliar to them. Their decisions, in turn, may be reviewed by the EPA regional office (if a state makes the decision), the Regional Administrator, or the Administrator. This, at best, duplicates efforts, wasting scarce agency resources. It also prolongs the period of uncertainty over pollution control obligations.

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.[64] Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls. Yet Section 301 was added to the law for the very purpose of eliminating such economic disparities. 1972 *Legis. Hist.*, *supra*, at 156.

Experience also shows that many variance applications lack merit,[65] a fact that weighed heavily with Congress.[66] Yet variance applications delay enforcement efforts. Congress rejected a proposal for case-by-case administrative extensions of the 1977 BPT deadline for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts, Congress

[64] Variance applications 76-09, 77-06, 77-14, 77-15, 77-16, 77-19, 78-02, 78-05, and 79-03 are still pending, according to EPA's June 29, 1984 status report.

[65] *E.g.*, EPA approved only four of the 53 BPT variance applications. Fourteen were denied; 16 withdrawn. The rest are still pending. 1983 *Hearings*, *supra*, at 2740.

[66] Congress repeatedly expressed the fear that variances would be pursued by unqualified sources in order to buy time for compliance. See, *e.g.*, 1977 *Legis. Hist.*, *supra*, at 452, 463-464, 683, 695, 860.

reasoned, perhaps obtaining a stay of the applicable requirements. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 860-862.[67] Indeed, Congress took a dim view of variances altogether:

> The conferees are aware of the administrative and judicial implications of modifications of a law as complex as the Clean Water Act. There was only one exception provided in the 1972 act and in that case, there had been great abuse. More than 100 steam electric powerplants applied for modification of thermal effluent limits. None have yet been placed on a compliance schedule to meet effluent limitations because of extensive delay as a result of this exception. And there is little question that after the administrative process there will be extensive litigation. Heat has become an unregulated pollutant, clearly not the intent of Congress. The Congress intended that there be a very limited waiver ***. That limited exception has been turned into a gaping loophole.

Id at 456-457, 641-642, 867. It therefore carefully circumscribed, through Section 301(*l*), the availability of variances where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(*l*), is inconsonant with the overall statutory scheme for strict control of toxics, and would give a handful of companies an unfair competitive advantage over the thousands of sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

[67] EPA claims it is inconsistent to say that variances delay compliance even though few companies apply. (EPA Br. 35, n.26). There is no inconsistency. The fact that a source is subject to a pretreatment standard means that it is, by definition, a "significant" environmental problem. 1972 *Legis. Hist.*, *supra*, at 800. When that source delays compliance, it thwarts Congress's overall scheme for strict toxics control and gains a competitive advantage over others in the same industry who comply with the law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 20, 1984

APPENDIX

CLEAN WATER ACT PROVISIONS

1. Section 208(b)(2)(C) of the Clean Water Act, as amended, 33 U.S.C. 1288(b)(2)(C):

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(C) the establishment of a regulatory program to—

(i) implement the waste treatment management requirements of section 201(c),

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial waste discharged into any treatment works in such area meet applicable pretreatment requirements.

2. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

3. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

4. Section 301(h) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(h):

(h) The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures

protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act.

5. Section 301(i) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(i):

(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time

required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable

to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (l) of this subsection, but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements to subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act, and the publicly owned treatment works to accept the discharge from the point source; and (iii)

the permit for such point source requires point source to meet all requirements under section 307(a) and (b) during the period of such time modification.

6. Section 301(j) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(j):

(j)(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977;

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 or not later than 270 days after the date of enactment of the Clean Water Act of 1977, whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

7. Section 304(f)(1) of the Clean Water Act, 33 U.S.C. 1314(f)(1) (1972):

(f)(1) For the purpose of assisting States in carrying out programs under section 402 of this Act, the Administrator shall publish, within one hundred and twenty days after the date of enactment of this title, and review at least annually

thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

8. Section 306(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1316(b)(1):

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;

phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

9. Section 306(e) of the Clean Water Act, as amended, 33 U.S.C. 1316(e):

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

10. Section 307(a) of the Clean Water Act, as amended, 33 U.S.C. (& Supp. V) 1317(a):

Sec. 307(a)(1) On and after the date of enactment of the Clean Water Act of 1977, the list of toxic pollutants or combination of pollutants subject to this Act shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after the date of enactment of the Clean Water Act of 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achieveable for the applicable category or class of point sources established in accordance with section 301(b)(2)(A) and 304 (b)(2) of this Act. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected orga-

nisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standards (or prohibition) with such modifications as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 301(b)(2)(A) and 304(b)(2) for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after the date of enactment of the Clean Water Act of 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

11. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

12. Section 308(a) and (b) of the Clean Water Act, as amended, 33 U.S.C. 1318(a) and (b):

(a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting

in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator

shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act.

13. Section 501(a) of the Clean Water Act, as amended, 33 U.S.C. 1361(a):

Sec. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

14. Section 509(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306,(B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.